

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROMALLE LEE LAIRD,

Defendant-Appellant.

UNPUBLISHED

December 13, 2011

No. 300457

Kent Circuit Court

LC No. 2010-001234-FH

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

SERVITTO, J. (*concurring*).

I concur with the ultimate conclusion of the majority to affirm, but write separately to express my disagreement with the majority's conclusion that the evidence of defendant's prior conduct was admissible pursuant to MRE 404(b).

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: "(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice." *People v Kahley*, 277 Mich App 182, 184–185; 744 NW2d 194 (2007).

Here, the prosecution sought to introduce evidence of defendant's prior conduct and statements from his June 4, 2009 arrest for possession with intent to deliver 15-20 individually wrapped rocks of cocaine. The stated purpose for the introduction of such evidence was to "demonstrate lack of accident or mistake and intent to deliver cocaine on the date of [the instant] incident." Defendant objected to the introduction of the prior bad acts evidence, but the trial court found that the incidents contained some similarities and thus allowed its admission for the limited purposes suggested by the prosecution. However, defendant's theory of the case in this matter was not that he acted by mistake or accident, or that Herth misconstrued what occurred. Instead, he denied that he engaged in any drug transaction at all. Defendant affirmatively testified that he had no drugs on his person and that no drug transaction between him and Herth occurred. Thus, the other acts evidence was not relevant under either the absence of mistake or accident theory.

As to whether the challenged evidence was admissible to show that defendant intended to deliver crack cocaine, the majority notes that where other acts evidence is offered to show intent, the acts must be of the same general category to be relevant. *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005). But, evidence of intent is relevant because it "negates the

reasonable assumption that the incident was an accident.” *Id.*, citing *People v VanderVliet*, 444 Mich 52, 80; 508 NW2d 114 (1993). And while it has been stated that the more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, *id.*, this “doctrine of chances” is not to be used without caution. As our Supreme Court recognizes, “the prosecutor must make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person The applicability of the doctrine of chances depends on the similarity between the defendant's prior conviction and the crime for which he stands charged.” *People v Crawford*, 458 Mich 376, 394-395; 582 NW2d 785 (1998)(internal citations and quotations omitted).

In *Crawford*, our Supreme Court was called upon to determine the admissibility of a defendant’s prior conviction of delivery of a controlled substance in his then current jury trial for possession with intent to deliver a controlled substance. The prosecutor sought to introduce the prior conviction under MRE 404(b) contending that the conviction was relevant to show knowledge and intent. The trial court agreed and admitted the evidence. The Supreme Court held that the trial court abused its discretion in allowing the evidence at trial and reversed defendant’s conviction. It concluded:

[T]here is an insufficient factual nexus between the prior conviction and the present charged offense to warrant admission of the evidence under the doctrine of chances. The arresting officer from the 1988 offense testified at length about how he had waited with a codefendant in that earlier case until the defendant and a codefendant appeared on the scene. He said that the defendant and the third man got out of their car and entered an apartment building. The defendant was carrying a distinctive plastic bag. After a few moments, the officer was invited into the apartment. Cocaine was taken from the bag and handed to the officer. After field testing it, the officer handed \$5,000 to the defendant. He then gave a prearranged signal that brought in other officers to arrest all the participants.

In this case, however, the defendant was not caught in the act of selling drugs. Rather, he was stopped for a routine traffic violation, which ultimately led to the discovery of cocaine hidden in the dashboard of his car. There was evidence at trial that the defendant had purchased the car just five to ten days before his arrest, and that the car had been in the possession of others during that time, lending support to the defense theory that the prior owner or someone else left the drugs in the car, unwittingly or in an attempt to frame the defendant. The plausibility of this defense was to be determined by the jury on the basis of its assessment of the credibility of the witnesses. However, the factual relationship between the 1988 crime and the charged offense was simply too remote for the jury to draw. The facts of the 1988 drug offense simply do not bear out the prosecutor’s contention that the defendant “obviously knew” the drugs were in his dashboard and that he intended to deliver them. The prior conviction only demonstrates that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine. To the extent that the 1988 conviction is logically relevant to show that the defendant

was also a drug dealer in 1992, we believe it does so solely by way of the forbidden intermediate inference of bad character that is specifically prohibited by MRE 404(b). Thus, the defendant's prior conviction was mere character evidence masquerading as evidence of "knowledge" and "intent." Because MRE 404(b) expressly prohibits the use of prior bad acts to demonstrate a defendant's propensity to form a certain mens rea, we hold that the trial court abused its discretion in admitting evidence of the defendant's prior conviction and reverse and remand the case for a new trial. *Crawford*, 458 Mich at 395-397.

Thus, our Supreme Court clearly still closely scrutinizes the similarities between the prior act(s) and the charged act to determine whether the prior conduct is admissible under MRE 404(b).

In the instant matter, defendant was observed removing a white object from his mouth and transferring it to his hand while in an area known for drug trafficking. He was then observed engaging in what appeared to be a hand to hand transaction with a known crack cocaine addict. When arrested a short time later, defendant had no drugs on his person, though two crack rocks were found near the crack addict. The prior bad acts evidence, in contrast, concerned the execution of a search warrant at a property where defendant was present but did not reside. In that incident, defendant was found to have 20 crack rocks, most of which were individually packaged, in his pants pocket. During that incident, defendant provided police with a false name, and advised police that he was going to share the crack cocaine with the women at the home so he could have sex with them. The only factor that is the same in the two incidents is the appearance of crack cocaine. The circumstances surrounding the incidents, the quantities involved, the locations, and defendant's actions during and after the incidents are vastly dissimilar. Based on the above, it appears that the prior bad act was not admitted for a proper purpose but instead merely as propensity evidence, and I would find that the trial court abused its discretion in admitting the evidence.

That being said, a "preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (footnote omitted), quoting MCL 769.26. The defendant bears the burden of demonstrating that a preserved, nonconstitutional error resulted in a miscarriage of justice. *Id.* at 493-494; see also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Viewing the case as a whole, I cannot say that the error in admitting the 404(b) evidence was outcome-determinative. Witnesses testified to observing what appeared to be behavior consistent with drug trafficking on defendant's part, and then observing what appeared a hand-to-hand drug transaction with a known crack addict. Herth testified to purchasing crack cocaine from defendant and was indeed found to have two rocks of crack cocaine near his person when approached a short time after his encounter with defendant. Absent the 404(b) evidence there was more than sufficient evidence to convict defendant as charged, such that it cannot be said that the erroneous admission of such evidence resulted in a miscarriage of justice. Thus, while I disagree with the majority's conclusion that the other acts evidence was admissible pursuant to MRE 404(b), I nevertheless find the admission of such evidence was not outcome determinative

and would have affirmed.

/s/ Deborah A. Servitto